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## Judicial independence under threat: The Court of Justice to the rescue

C-64/16, *Associação Sindical dos Juizes Portugueses*, Judgment of the Court of Justice (Grand Chamber) of 27 February 2018, EU:C:2018:117

Laurent Pech and Sébastien Platon\*

### 1. Introduction

The Court of Justice's ruling in the case of *Associação Sindical dos Juizes Portugueses* is nothing short of ground-breaking. First, it is arguably the most important judgment since *Les Verts*<sup>1</sup> as regards the meaning and scope of the principle of the rule of law in the EU legal system. Secondly, it comes close to being the EU equivalent of the US Supreme Court case of *Gitlow* as regards the principle of effective judicial protection.<sup>2</sup>

With respect to the rule of law, in a couple of inspired and inspiring paragraphs, the Court offers a neat digest of the essential functions and features of what Article 2 TEU presents as one of the EU's fundamental values which is said to be common to its Member States. One of the most innovative and welcome aspects of the Court's ruling is the conclusion it draws from a combined reading of Article 2 TEU, Article 4(3) TEU (principle of sincere cooperation) and Article 19(1) TEU (principle of effective judicial protection of individuals' rights):

The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law ... It follows that every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection. ... In order for that protection to be ensured, maintaining [a national] court or tribunal's independence is essential.<sup>3</sup>

The ruling in *Associação Sindical dos Juizes Portugueses*, often informally referred to as "the Portuguese case", may be viewed as the Court's first significant albeit indirect answer to the worrying and ongoing process of 'rule of law backsliding' first witnessed in Hungary and now under way in Poland.<sup>4</sup> Indeed, this judgment essentially establishes a general obligation for Member States to guarantee and respect the independence of their national courts and tribunals. What is particularly noteworthy is that the Court has done this solely based on Article 19(1) TEU read in light of Articles 2 and 4(3) TEU.<sup>5</sup> In doing so, the Court annihilates the argument which the Polish government has repeated ad nauseam since it has been subjected to its Rule of Law Framework in January 2016 and according to which Polish authorities can introduce

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\* Professor of European Law, Middlesex University London and Professor of Public Law, University of Bordeaux. This annotation, which was finalised in July, builds upon a blog post published on *EU Law Analysis* blog on 13 March 2018: <http://eulawanalysis.blogspot.com/2018/03/rule-of-law-backsliding-in-eu-court-of.html>. We are grateful to Professor Kim Lane Scheppele for her comments. The usual disclaimers apply.

<sup>1</sup> ECJ, Judgment of 23 April 1986, *Les Verts v. Parliament*, 294/83, EU:C:1986:166.

<sup>2</sup> *Gitlow* was the first case in which the provisions of the US federal Bill of Rights were held by the US Supreme Court to apply to state law even when the states act within their own sphere of competence: 268 US 652 (1925).

<sup>3</sup> Paras 36, 37 and 41.

<sup>4</sup> For a detailed overview of the EU institutions' (in)action with respect to Hungary and subsequently Poland, see Pech and Scheppele, "Illiberalism Within: Rule of Law Backsliding in the EU", (2017) 19 *Cambridge Yearbook of European Legal Studies* 3.

<sup>5</sup> This approach had been previously advocated by Professors Kochenov, Scheppele and one of the present authors. See e.g. Kochenov and Pech, "Better late than never: On the European Commission's Rule of Law Framework and its first activation" (2016) 54(5) *Journal of Common Market Studies* 1062 and Pech et al, An EU mechanism on democracy, the rule of law and fundamental rights – Annex I (EPRS study) PE 579.328, April 2016, p. 200 (infringement actions based on Article 2 TEU in conjunction with Articles 4(3) and/or 19(1) TEU is presented as one of the options the Commission should explore in order to better protect the rule of law in the EU).

whatever judicial ‘reforms’ they see fit as the organisation of national judiciaries would allegedly fall entirely outside EU competence.<sup>6</sup> An argument which the Hungarian government is currently relying on at a time where it is pushing to create a new separate administrative court system to deal with cases on issues such as public procurement, electoral litigation and asylum.<sup>7</sup>

Before examining how the “Portuguese case” may prove a potentially decisive shot across the Polish bow and more generally, the extent to which and when the EU principle of judicial independence may be *directly* relied upon to challenge national authorities which are seeking to fundamentally undermine the principle of separation of powers,<sup>8</sup> the facts, Opinion of the Advocate General and outcome of this case will be succinctly presented. This casenote’s main submission is that the Court of Justice’s approach, which is centred on the notion of ‘fields covered by EU law’ and merely requires the existence of a virtual link between relevant national measures and EU law in order for applicants to challenge national authorities on the sole basis of Article 19(1) TEU, is both innovative and compelling.

## 2. Factual and legal background to the dispute

In 2014, to remedy what was seen as an excessive government deficit in the context of EU financial assistance provided to Portugal, the Portuguese legislature introduced a temporary reduction in the remuneration paid to the persons working in the Portuguese public administration, including judges.<sup>9</sup> The *Associação Sindical dos Juizes Portugueses* (ASJP), acting on behalf of members of the *Tribunal de Contas* (Court of Auditors), decided to challenge the salary-reduction measures on the main ground that that these measures would infringe ‘the principle of judicial independence’ enshrined, not only in the Portuguese Constitution, but also in EU law, in the second subparagraph of Article 19(1) TEU (“Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”) and Article 47 of the EU Charter of Fundamental Rights which provides for a right to an effective remedy and to a fair trial. This issue was then subsequently referred by the Portuguese Supreme Administrative Court to the Court of Justice for a preliminary ruling.

## 3. Opinion of the Advocate General

Advocate General Saugmandsgaard Øe first proposed that the arguments put forward by the Portuguese Government and, more surprisingly, by the European Commission on the

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<sup>6</sup> Pech and Scheppele, “Is the Organisation of National Judiciaries a Purely Internal Competence?”, *VerfassungsBlog*, 4 March 2018: <https://verfassungsblog.de/is-the-organisation-of-national-judiciaries-a-purely-internal-competence/>

<sup>7</sup> See e.g. Justice Minister Laszlo Trocsanyi: “Setting up the organization of the judiciary is a national responsibility, EU institutions have no mandate to specifically determine its framework” quoted in Z. Simon, “Hungary to EU: Tread Carefully When Evaluating Judicial Revamp”, *Bloomberg*, 12 June 2018: <https://www.bloomberg.com/news/articles/2018-06-12/hungary-to-eu-tread-carefully-when-evaluating-judicial-revamp>. For a general and helpful overview: Hungarian Helsinki Committee, *Attacking the last line of defence. Judicial Independence in Hungary in Jeopardy*, 15 June 2018: <https://www.helsinki.hu/en/attacking-the-last-line-of-defence/>

<sup>8</sup> As first noted by Ovádek, “Has the CJEU just reconfigured the EU Constitutional Order?”, *VerfassungsBlog*, 28 February 2018: <https://verfassungsblog.de/has-the-cjeu-just-reconfigured-the-eu-constitutional-order/>. For another thoughtful case note see Krajewski, “*Associação Sindical dos Juizes Portugueses*: The Court of Justice and Athena’s dilemma”, *European Papers/European Forum*, 30 May 2018: <http://www.europeanpapers.eu/en/europeanforum/associacao-sindical-dos-juizes-portugueses-court-of-justice-and-athena-dilemma>

<sup>9</sup> The concept of “judges” must be understood in this instance as the Judges of the Tribunal Constitucional [Constitutional Court], Judges of the Tribunal de Contas [Court of Auditors], the Attorney General of the Republic, judges and public prosecutors, judges of administrative and tax tribunals and district judges.

admissibility of the referring court's request should be rejected. The Advocate General concluded that the Court has been provided with "sufficient information to be in a position to rule on the interpretation of Article 19 TEU and Article 47 of the Charter and thus to give a useful answer to the question submitted to it" (para 24) and that "it is not obvious from the material submitted to the Court that the interpretation of EU law sought has no connection with the subject matter of the dispute in the main proceedings or that the problem raised is hypothetical in nature" (para 31).

On the matter of the jurisdiction of the Court, which again both the Portuguese Government and Commission decided to challenge, the Advocate General offers some interesting albeit brief observations on the scope of application of Article 19(1) TEU and Article 47 of Charter. One of the noteworthy claims is that while these two provisions may lead to the same actual result, the criteria for their respective application "are not set out in the same way" (para 42) with Article 19(1) TEU for instance not subject to Article 51(1) of the Charter and in particular the requirement that the provisions of the Charter only bind the Member States "when they are implementing EU law". This point answers the argument put forward by the Portuguese Government and the Commission, that the Court would lack jurisdiction because (a) the Court cannot rule on the interpretation of Article 19 TEU taken on its own and (b) the national legislation in question would not be a measure implementing EU law within the meaning of Article 51(1) of the Charter.

With respect to the latter, the Advocate General is however of the view that the Portuguese legislation does in fact constitute an implementation of provisions of EU law. With respect to the former, the Advocate General's main conclusions are as follows:

- The purpose of the second subparagraph of Article 19(1) TEU are "primarily procedural in nature" (para 63);
- The concept of effective judicial protection, within the meaning of the second subparagraph of Article 19(1) TEU, ought not to be confused with the principle of judicial independence (para 64);
- The obligations for Member States to provide a system of remedies as set out in the second subparagraph of Article 19(1) TEU only relate to the right to effective judicial protection but "not to the right to a fair hearing before an independent court", the content of which would be substantially different (para 65).

On the basis of these observations, the Advocate General concludes that the second subparagraph of Article 19(1) TEU cannot be interpreted as enshrining "a general principle of EU law according to which the independence of judges sitting in all the courts of the Member States should be guaranteed" (para 67). Be that as it may, the Advocate General is of the view that neither Article 19(1) TEU nor Article 47 of the Charter preclude the adoption of national measures such as those contested in the main proceeding since they do not specifically target judges (para 68) and do not undermine the principle of judicial independence contained in Article 47 (para 81).

#### **4. Judgement of the Court**

The most noteworthy aspect of the ruling is arguably the Court's quasi-exclusive focus on Article 19(1) TEU, which the Court describes as giving 'concrete expression to the value of the rule of law stated in Article 2 TEU' having previously recalled that mutual trust between national courts "is based on the fundamental premiss that Member States share a set of common values on which the European Union is founded".<sup>10</sup> On the basis of a combined reading of Articles 2, 4(3) and 19(1) TEU, the Court highlights, more than ever before, the duties of

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<sup>10</sup> Opinion 2/13 of the Court (Full Court) of 18 December 2014, EU:C:2014:2454, para 168.

national courts under the EU Treaties and in particular, their duty to ensure “that in the interpretation and application of the Treaties the law is observed”, while repeatedly observing that in order for the EU legal system to operate efficiently and for individuals to continue to benefit from the principle of the effective judicial protection of their EU rights, it is essential that national courts remain independent.

Whilst the outcome of the case itself may be viewed as neither surprising nor problematic, it is the Court’s approach which is particularly interesting. Before concluding that the “salary-reduction measures at issue in the main proceedings cannot be considered to impair the independence of the members of the Tribunal de Contas” (para 51), the Court referred to a number of criteria which must guide national courts should they have to review national measures which allegedly infringe the EU principle of judicial independence, which the Court exclusively connects in this ruling with Article 19(1) while emphasising that the guarantee of judicial independence is required “not only at EU level ... but also at the level of the Member States as regards national courts” (para 42):

- Could the national measures affect the independence of national judges?
- Are they justified by an objective reason of public interest?
- Are they proportionate?
- Are they temporary?
- Are they specific to judges?

One question which does not need to be answered however is whether the national measures fall within the scope of Article 47 of the Charter. The Court points out “that as regards the material scope of the second subparagraph of Article 19(1) TEU, that provision relates to ‘the fields covered by Union law’, *irrespective* [our emphasis] of whether the Member States are implementing Union law, within the meaning of Article 51(1) of the Charter” (para 29).

In this case, on the basis of these criteria, the Grand Chamber of the Court concludes that “the second subparagraph of Article 19(1) TEU must be interpreted as meaning that the principle of judicial independence does not preclude general salary-reduction measures, such as those at issue in the main proceedings, linked to requirements to eliminate an excessive budget deficit and to an EU financial assistance programme, from being applied to the members of the Tribunal de Contas” (para 52).

## 5. Analysis

The significance of this ruling has been highlighted by President Lenaerts himself in two important speeches. In a speech given at a conference organised by the Supreme Administrative Court of Poland, after recalling the importance of the principle of judicial independence in general, the President of the European Court of Justice stressed the seminal nature of the Court’s ruling. He then went on to explain that in his view, the ruling had three direct implications: (1) The scope of application of 19(1) TUE is not the same as that of Article 47 of the Charter; (2) “where a national court qualifies as a ‘court or tribunal’ as defined by EU law and such a court enjoys jurisdiction to rule on questions of EU law, that court acts as a European court and accordingly, Article 19(1) TEU protects its independence” and (3) the ruling positively develops the law on judicial remedies and “shows that national courts are called upon to play a pivotal role in European integration, and that the ECJ is committed to upholding the rule of law within the EU”.<sup>11</sup>

In a subsequent speech at the FIDE Congress in May 2018, President Lenaerts further emphasised that the “effective protection of EU rights indeed requires that the competent

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<sup>11</sup> “The Court of Justice and National Courts: A Dialogue Based on Mutual Trust and Judicial Independence”, Speech at the Supreme Administrative Court of the Republic of Poland, 19 March 2018, pp. 7-8 (on file with the authors).

national court must be insulated from any political pressure, notably on the part of the public authorities that may have been responsible for the breach of those rights” before noting that the effective application of the requirements for judicial independence is essential *inter alia* “in the context of the rules of mutual recognition and enforcement of judicial decisions within the framework of the Area of Freedom, Security and Justice”.<sup>12</sup>

The Court’s ruling is less remarkable for its renewed but not new emphasis on the importance of judicial independence, which is traditionally viewed as a core component of the rule of law,<sup>13</sup> than its exclusive reliance on Article 19(1) TEU, in conjunction with Article 2 TEU (referred three times in the “substance” part of the ruling), rather than Article 47 of the Charter. This gives national litigants the possibility to allege violations of the principle of judicial independence by national authorities in situations where the link with EU Law may be viewed as tenuous or at the very least, in situations where EU Member States do not necessarily “implement” EU law within the meaning of Article 51(1) of the Charter. While bold, we also find the Court’s interpretation of Article 19(1) TEU not only compelling but also warranted.

### 5.1 The Court’s preference for Article 19(1) TEU over Article 47 of the Charter

Article 47 of the Charter, like any other provision of the Charter, can only be relied upon in national situations where Member States are implementing Union law within the meaning of Article 51(1) of the Charter. And while the Court broadly interpreted this provision in *Åkerberg Fransson*<sup>14</sup> relying on the traditional notion of scope of EU law,<sup>15</sup> it did also confirm that where “a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction”.

In the present case, it is arguable that the situation in the main proceedings did not come within the scope of EU law. There is for instance no EU rule governing the remuneration of national judges but one could also argue, as the ASJP did, that the temporary reduction in the amount of public sector remuneration was based on mandatory requirements for reducing the Portuguese State’s excessive budget deficit in 2011, as imposed on the Portuguese Government by EU decisions granting, in particular, financial assistance to that Member State. The Court has however been reluctant to assess Portuguese austerity measures in the past.<sup>16</sup> However, as AG Saugmandsgaard Øe noted, the Court’s alleged lack of jurisdiction on the basis of the Charter was not manifestly apparent in the instant case since “the referring court has supplied more explicit, albeit relatively summary, information as to the existence of such implementation of EU law in the present case.”<sup>17</sup> In particular, the referring court linked the national measures challenged in the main proceedings with a list of EU law measures relating to the excessive deficit situation of the Portuguese State and the financial assistance from which it benefited.<sup>18</sup>

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<sup>12</sup> “The Court of Justice and the Rule of Law”, Speech at the XXVIIIth FIDE Congress, Estoril, May 2018 (on file with the authors).

<sup>13</sup> See for instance, Venice Commission, *Report on the Rule of Law*, Study No 512/2009, CDL-AD(2011)003rev, 4 April 2011.

<sup>14</sup> Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, EU:C:2013:105, para 19-22. See Hancox, “The meaning of “implementing” EU law under Article 51(1) of the Charter: *Åkerberg Fransson*”, 50 CML Rev. (2013), 1411.

<sup>15</sup> See generally, Groussot, Pech and Pertursson, “The Reach of EU Fundamental Rights on Member State Action after Lisbon” in de Vries, Bernitz and Weatherhill (eds), *The Protection of Fundamental Rights in the EU after Lisbon* (Hart, 2013), pp. 97-118.

<sup>16</sup> Case C-128/12, *Sindicato dos Bancários do Norte*, EU:C:2013:149; Case C-264/12, *Sindicato Nacional dos Profissionais de Seguros e Afins*, EU:C:2014:2036; Case C-665/13, *Sindicato Nacional dos Profissionais de Seguros e Afins*, EU:C:2014:2327.

<sup>17</sup> Para 45 of the opinion.

<sup>18</sup> Para 46 of the opinion.

In *Florescu*, the Court had already held that the Charter applied to national measures adopted to meet the conditions attached to the financial assistance granted by the EU to a Member State, even when the Member State in question enjoys some discretion in deciding what measures are most likely to lead to performance of its undertakings, as long as the objectives set out in the EU rules are sufficiently detailed and precise to permit the inference that the purpose of the national measures is to implement EU Law.<sup>19</sup> The Court could have applied this precedent and decided that the Charter was applicable to salary reductions applied to the judges of the Tribunal de Contas. The framework for financial assistance was not the same as in *Florescu*,<sup>20</sup> but it was close enough to warrant the same conclusion.<sup>21</sup> As a matter of fact, AG Saugmandsgaard Øe precisely suggested that the *Florescu* precedent could apply.

Yet, the Court went down another route and did not elaborate on whether or not the Charter applied to the case. Instead, the Court just focused on Article 19(1) TEU, with possible far-reaching consequences for the Court's jurisdiction and its power to assess the Member States' judiciary. The fact that the Court chose a new approach (previously supported by some scholars<sup>22</sup>) rather than one supported by its own case-law may be construed as a warning by the Court to national authorities currently engaged or tempted to systematically undermine the rule of law in their countries.<sup>23</sup> Be that as it may, the Court's interpretation of the second paragraph of Article 19(1) TEU, a rather recent addition to EU primary Law, added by the Lisbon Treaty and codifying the case-law of the Court,<sup>24</sup> is persuasive. At its core, this Treaty provision is more a functional necessity for the EU than a standard for national justice. National courts are the linchpins of the enforcement of EU Law, notably through primacy, direct and indirect effect and State liability. They are also instrumental for the respect of the rule of law by the EU itself because, when natural and legal persons cannot directly contest a general measure before the Court because of the special admissibility conditions laid down in the treaty<sup>25</sup>, and if this measure has not been implemented by EU institutions, the only way to bring the matter before the Court is to plead the invalidity of this general measure before the national courts so that they refer the matter to the Court of Justice for a preliminary ruling.<sup>26</sup> Of course, this requires that there be a legal remedy available at national level. Whether it is to ensure the effectiveness of EU Law or to make sure that the EU itself respects the rule of law, Member States must establish a system of legal remedies and procedures which ensure that individuals have a right to effective judicial protection. However, it does not necessarily mean that this obligation contains standards applicable to the remedies and procedures in question. Advocate General Saugmandsgaard Øe considered for example that "the purpose of that subparagraph, which

<sup>19</sup> Case C-258/14, *Eugenia Florescu and Others*, EU:C:2017:448, para 48.

<sup>20</sup> In *Florescu*, Romania had been bailed out under Regulation 332/2002 establishing a facility providing medium-term financial assistance for non-euro area Member States experiencing difficulties with respect to their balance of payments, OJ 2002, L 53/1. In *ASJP*, Portugal had been bailed out under the European Financial Stabilisation Mechanism (EFSM).

<sup>21</sup> Markakis and Dermine, "Bailouts, the legal status of Memoranda of Understanding, and the scope of application of the EU Charter: *Florescu*", 55 CML Rev. (2018), 643-672, at 664-665.

<sup>22</sup> See e.g. Kochenov and Pech, "Better late than never: On the European Commission's Rule of Law Framework and its first activation", op. cit.

<sup>23</sup> See Section 5.4 below.

<sup>24</sup> See in particular Case C-50/00P, *Unión de Pequeños Agricultores*, EU:C:2002:462, para 41: "it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection."

<sup>25</sup> See Art 263(4) TFEU. For the interpretation of the Court of the condition of "individual concern", see Case 25-62, *Plaumann & Co. v. Commission*, EU:C:1963:17. For the interpretation of the Court of "regulatory act which is of direct concern to them and does not entail implementing measures", See Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v. European Parliament and Council*, EU:C:2013:625, paras 51-61.

<sup>26</sup> Case 294/83, *Les Verts v. European Parliament*, EU:C:1986:166, para 23.

places an obligation on Member States to establish remedies that enable those right to be effectively protected, is primarily procedural in nature.”<sup>27</sup>

In this ruling, the Court, against the Opinion of its Advocate General, went beyond this mere functional necessity of national remedies sufficient to enforce and review EU law. It stated that national courts of the Member States must meet the fundamental requirements of justice as defined by EU law, including that of an independent justice, as Article 19 entrusts the responsibility for ensuring judicial review in the EU legal system not only the Court of Justice but to national courts as well. In order to reach this conclusion, the Court boldly but convincingly linked Article 19 TEU to Article 2 TEU, and especially the rule of law,<sup>28</sup> a principle on the basis of which the Court of Justice has broadly interpreted its jurisdiction so as to avoid gaps in legal protection as far as possible,<sup>29</sup> and which the Court has now described as being given concrete expression by Article 19 TEU. In so doing, the Court has gone beyond its traditional reliance on the rule of law as a hermeneutic principle for interpreting other provisions. By adding to the mix the principle of sincere cooperation,<sup>30</sup> which once again plays a prominent role in the constitutionalisation of EU Law,<sup>31</sup> the Court effectively and positively transformed the rule of law into a *legally enforceable standard to be used against national authorities* to challenge targeted attacks on national judiciaries.

The marginalisation of Article 47 of the Charter, while possibly regrettable, was arguably unavoidable. In the present case, however, it could have been argued that Article 47 was applicable (as discussed above) but the limited scope of application of Article 47 compared with the scope of Article 19(1) TEU makes the latter a much preferable legal basis than the former in order to ensure an effective legal protection of individuals’ rights under EU law in future cases. The issue of the scope of Art. 19(1) TEU is further discussed below.

## **5.2 The scope of the obligation for Member States to ensure that their courts meet the requirements of effective judicial protection**

In its ruling, the Court mentions the scope of Article 19(1) as regards Member States in two instances. The Court first addresses this issue, rather briefly and cryptically,<sup>32</sup> before addressing it again in a much clearer and lengthier way.<sup>33</sup> However, it seems that the Court does not speak about the same thing in both instances. The Court makes it clear in paragraphs 37-41 that Article 19(1) TEU is applicable *in abstracto*, as an *objective principle*, to national measures of a general scope which target the judiciary. This is the most important part of the ruling, since it gives the Court to power to review such measures, in this case and in future cases (5.2.2.). However, this does not tell us if Article 19(1) TEU is also applicable, as a *right*, in the absence of such national general measures. Is it possible to use Article 19(1) TEU in specific cases (*in concreto*) where there is no general measure possibly infringing the rule of law but only an alleged specific breach of the right to an effective judicial protection? And if so, is Article 19(1) TEU of any added value compared to Article 47 of the Charter? This is where paragraph 29 of the ruling may be relevant, but its lack of clarity makes it difficult to draw definitive conclusions (5.2.1)

### **5.2.1 *In concreto*: the “fields covered by EU Law”**

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<sup>27</sup> Para 63.

<sup>28</sup> For an overview of the genesis of Article 2 TEU and how the principle of the rule of law has been relied upon and interpreted in EU law, see L. Pech, “A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law”, *EuConst* 6 (2010), 359.

<sup>29</sup> See recently Case C-72/15, *PJSC Rosneft Oil Company v. Her Majesty's Treasury and Others*, EU:C:2017:236.

<sup>30</sup> See para 34.

<sup>31</sup> Klamert, *The Principle of Loyalty in EU Law* (OUP, 2014), 63-83.

<sup>32</sup> Para 29.

<sup>33</sup> Paras 37-41.



The question here is whether Article 19(1) TEU has a broader scope than the Charter, and therefore might apply to Member States in cases where the Charter does not apply. This issue was not decisive for the present case because, as suggested above, it is likely that the Charter was applicable to this case in any event. It may be however be relevant in future cases where the Charter does not apply. Could then Article 19(1) TEU be of any help?

The question arises because of the rather cryptic wording of the ruling at para 29: “as regards the material scope of the second subparagraph of Article 19(1) TEU, that provision relates to ‘the fields covered by Union law’, irrespective of whether the Member States are implementing Union law, within the meaning of Article 51(1) of the Charter”.

Does this mean that the scope of Article 19(1) TEU is necessarily broader than the scope of the Charter? The Court does not elaborate on this point, perhaps deliberately. One could argue that the different wording of Article 19(1) does not automatically imply a broader scope of application. This view is supported by the fact that the Court itself sometimes uses the expression “field covered by EU Law” to describe the scope of application of the Charter as regards Member States.<sup>34</sup> Yet the language used by the Court (“irrespective of ...”), suggests that the Court understands the scope of application of Article 19(1) TEU differently from the scope of application of fundamental rights in EU law. This is consistent with the difference between the respective roles of fundamental rights and Article 19(1) in the constitutional framework of the European Union. Fundamental rights were first established in EU law as general principles in order to protect individuals against the EU itself, and not against the States.<sup>35</sup> Their scope gradually evolved to apply to Member States when they apply EU law,<sup>36</sup> when they derogate to EU law,<sup>37</sup> and more generally when they act within the scope of EU law,<sup>38</sup> but always keeping in mind that fundamental rights in EU law cannot lead to a competence creep, as evidenced by Article 51(2) of the Charter.<sup>39</sup> By contrast, Article 19(1) TEU appears to be understood by the Court as a standalone, quasi-federal provision applicable to the judiciary of the European Union as a whole, including national courts.

This leads to a second question. *If* the scope of Article 19(1) TEU is broader than the Charter, how much broader is it? This question is even more open to conjectures than the previous one. However, the difference between “fields covered by Union Law” and situations which are covered by EU law according to the *Fransson* case could be used to fill in certain gaps in the protection offered by the Charter if it means that Article 19 could apply to situations which are *not themselves covered* by EU law but *belong to a field covered* by EU Law.

For example, in *Torralbo Marcos*,<sup>40</sup> the main applicant’s former employer, Korota, was subject to court-supervised administration proceedings. Mr Torralbo-Marcos wanted to benefit from Article 3(1) of the Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer. According to this provision, “Member States shall take the measures necessary to ensure that guarantee institutions guarantee (...) payment of employees’ outstanding claims resulting from contracts of employment or employment relationships, including, where provided for by national law, severance pay on termination of employment relationships”. However, at this stage, Korota had not yet been declared insolvent under Spanish

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<sup>34</sup> See Case C-414/16, *Egenberger*, EU:C:2018:257, para 76.

<sup>35</sup> See Case 29-69, *Stauder*, EU:C:1969:57; Case 11-70, *Internationale Handelsgesellschaft mbH*, EU:C:1970:114.

<sup>36</sup> Case 5/88, *Wachauf*, EU:C:1989:321.

<sup>37</sup> Case C-260/89, *Elliniki Radiophonia Tiléorassi (ERT)*, EU:C:1991:254.

<sup>38</sup> Case C-617/10, *Aklagaren v. Hans Åkerberg Fransson*.

<sup>39</sup> “The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.”

<sup>40</sup> Case C-265/13, *Emiliano Torralbo Marcos v. Korota SA*, EU:C:2014:187.

law. Mr Torralbo Marcos therefore commenced court proceedings in order to have a legal finding of Korota's insolvency, which would have triggered the application of the Directive. He complained that the legal fees that he was required to pay violated Article 47 of the Charter. The Court of Justice found that it had no jurisdiction to answer the questions referred for a preliminary ruling by the Spanish court because the main proceedings did not fall within the scope of EU Law. In particular, in para 40 of the judgment, the Court noted that "the fact that, by the steps he has taken, Mr Torralbo Marcos is seeking, according to the statements of the referring court, to obtain such a declaration of insolvency in order to benefit from the [national guarantee institution]'s intervention in accordance with Article 3 of Directive 2008/94 is not sufficient to allow the view to be taken that the situation at issue in the main proceedings, at their present stage, falls within the scope of the directive and, consequently, of European Union law". Post *Associação Sindical dos Juizes Portugueses*, one could argue that the same situation could however be possibly considered as relating to a "field covered by EU law" under Article 19(1) TEU.

Does this mean that, in the present case, Article 19(1) applied because the national measures at issue were somehow connected with EU law, possibly through the decisions granting financial assistance to Portugal? This is not what other parts of the ruling indicate. It seems, rather, that the Court considered Article 19(1) TEU as a systemic requirement, which could be used *in abstracto* to challenge national measures affecting the independence of judges.

### 5.2.2 *In abstracto*: the "potential jurisdiction" test

In para 37, the Court states "that every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection", including the independence of the courts. The Court then finds that the Tribunal de Contas has potential jurisdiction over questions of EU law, for example questions relating to EU own resources and the use of financial resources from the EU. The Court therefore said that, to the extent that the Tribunal de Contas may rule "on questions concerning the application or interpretation of EU law, which it is for the referring court to verify, the Member State concerned must ensure that that court meets the requirements essential to effective judicial protection, in accordance with the second subparagraph of Article 19(1) TEU".

The applicability of Article 19 seems therefore to depend not whether the salary-reduction measures were adopted in order to implement EU Law but on whether the courts affected by this measure have jurisdiction, even if only *potentially*, over questions of EU law.

This reasoning bears a strong resemblance to the case-law of the Court regarding the application of Free Movement Law. In *Pistre*,<sup>41</sup> for example, the Court also relied on the *potential* effect of a national measure in order to decide on the applicability of EU law. The main proceedings in *Pistre* were criminal proceedings brought against several defendants for using labels liable to mislead consumers as to the qualities or provenance of products, in violation of French Law. The defendants argued that a national regulation, which sets out the conditions for the use of a certain geographic description (in this case the description "mountain" for certain products), contravened EU law. The Court found that, even though in this case the parties had neither made nor intended to make any use of the free movement of goods (the situation was purely internal with no importation involved), EU Law was applicable because the national measure had the potential to have an effect on the free movement of goods between Member States.<sup>42</sup>

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<sup>41</sup> Joined Cases C-321/94, C-322/94, C-323/94 & C-324/94, *Pistre and others*, EU:C:1997:229.

<sup>42</sup> Paras 44 and 45.

If this interpretation of the present ruling is correct,<sup>43</sup> the solution of the Court would be extremely far-reaching because *most* courts, if not all, “may rule (...) on questions concerning the application or interpretation of EU law”. For a national court *not* to come within the scope of Article 19(1) would require it to have a restrictive jurisdiction over matters not only that are not within the powers of the EU but furthermore that cannot be *affected* by EU law. In *Associação Sindical dos Juizes Portugueses*, the Court strongly suggested, despite leaving the last word to the referring court, that the Tribunal de Contas comes within the scope of Article 19(1) TEU because “questions relating to EU own resources and the use of financial resources from the European Union may be brought before [it]”.<sup>44</sup> It does not even seem necessary that the Court in question has *already* ruled on EU law questions at some point in the past. The mere *possibility* that it *could* happen (“may rule”) seems to be sufficient. However, the test suggested by the Court is, in all likelihood, limited to EU law *as it stands when the test is performed*. It is true that, in some areas of EU law, the Court sometimes takes into account predictable evolutions of EU law. For example, in Opinion 1/03, the Court stated that, in order to assess whether the EU has exclusive competence to conclude an international agreement, it is necessary “to take into account not only the current state of Community law in the area in question but also its future development, insofar as that is foreseeable at the time of that analysis”.<sup>45</sup> Yet, it would be unrealistic and unreasonable to apply Article 19(1) to courts which *might* rule on questions related to EU provisions that *might* exist in the future. Be that as it may, the importance and the variety of subject-matters affected by EU legislation, as it stands today, means that very few courts are now susceptible of falling outside the scope of Article 19(1) TEU.

There is a functional limitation to the scope of Article 19(1) TEU. According to the Court, this provision is only applicable “to the extent that” the courts affected by the national measure “may rule, as a ‘court or tribunal’, (...) on questions concerning the application or interpretation of EU law”. However, such a functional scope does not make much sense as regards the independence of judges. The independence of judges is, at its core, a structural requirement, dependent upon the legal guarantees existing within a legal system to avoid any political pressure on the judiciary.<sup>46</sup> Judges are either independent or they are not. It is quite unlikely that a national government would decide to limit the independence of judges only when they rule on questions which do not concern either the application or the interpretation of EU law. Even if national authorities were tempted to do just that, specifically to avoid the scope of the obligation derived by the Court from Article 19(1) TEU in the instant ruling, it would be a hard task to pinpoint exactly which areas of national law are unaffected by EU law.

Since the obligation for Member States to ensure that the courts which deal with EU law meet the EU standard is general and systemic in essence, this allows the Court to assess, as in the present ruling, whether a national general measure affecting the courts in question is likely to affect their compliance with EU standards. To put it differently, national “reforms” in the field of (or affecting) justice of the type we have seen in Poland, and which have been quasi-universally decried for their incompatibility with the most basic tenets of the rule of law, may now be directly reviewed on the basis of EU law and in particular the principle of judicial independence notwithstanding the lack of a general legislative competence in the field of justice. *Associação Sindical dos Juizes Portugueses* could (and probably will) be criticised as

<sup>43</sup> See, reaching the same conclusion: Jacqu , “La Cour de justice adresse un avertissement   la Pologne”, *Blog droit de l’Union europ enne*, <http://www.droit-union-europeenne.be/439010200>; Taborowski, “CJEU Opens the Door for the Commission to Reconsider Charges against Poland”, *VerfassungsBlog*, 13 March 2018; Krajewski, “Associa  o Sindical dos Ju zes Portugueses: The Court of Justice and Athena’s Dilemma”, *European Papers*, European Forum, 30 May 2018, 1-13.

<sup>44</sup> Para 39.

<sup>45</sup> Opinion 1/03, EU:C:2006:81, para 126.

<sup>46</sup> ECtHR, *Campbell and Fell v. UK*, Application No. 7819/77 and 7878/77, judgement of 28 June 1984, para 78.

another instance of “over-constitutionalisation” by the Court of Justice, to borrow the concept developed by Dieter Grimm.<sup>47</sup> It is however consistent with the nature of the EU as a neo-functionalist spill-over-based integrative organisation, constantly adapting to new challenges and new needs. It is furthermore consistent and an inevitable consequence of the legal importance of the rule of law in the EU system, not only as a value and an objective that the EU has a mandate to enforce<sup>48</sup> but also as a functional necessity<sup>49</sup> underpinning the legitimacy of EU decision-making (in which the Member States participate as members of the Councils), vertical cooperation between Member States and the European Union (including the preliminary procedure) and horizontal cooperation between Member States, especially mutual recognition which is based on mutual trust, itself founded on the premiss that Member States share and respect a common set of values.<sup>50</sup>

Since Article 19(1) TEU empowers the Court to review whether a national measure affects the independence of most national courts, this raises the question of how this “Article 19(1) test” relates if at all with the “Article 267 test” (i.e., whether the body that made a request for a preliminary ruling is a “court or tribunal”). Is the latter likely to spill over the former? Surely, being independent is one of the necessary, sine qua non features of a court. Does it mean that the Court of Justice could reject, as inadmissible, any request for a preliminary ruling by courts which may no longer be considered independent due to a national general measure? In theory, yes, but this would also mean that the Court of Justice would somehow abandon to their fate the national courts which independence has already been undermined in part or entirely, therefore doing national governments who despise the monitoring of the Court an unexpected favour. In any case, it will be for the Court, in its future case-law, to clarify how the two “tests” relate to one another.

Typically, the Court’s jurisdiction to review national measures targeting national courts which “may rule” on EU law matters will apply when the national measures in question are challenged directly. In the present ruling, the main proceedings related to a union of judges who *directly* challenged the national salary-reduction measures before the Supreme Administrative Court. The Court could also, of course, review such measures through infringement proceedings, which is probably what the judges of the Court had in mind when issuing this ruling.<sup>51</sup> However, national measures which may undermine the independence of a court may also be challenged *indirectly* through a national litigation which is not connected with EU law. In such a case, a party could claim that, due to a national measure allegedly affecting the judiciary, the national court having jurisdiction is not independent. If such a matter were to be brought to the Court of Justice, what would it do? Would it require that the main case itself falls within the scope of EU Law? Or would the Court accept its own jurisdiction as long as the national measure that is challenged incidentally is likely to affect the independence of a court which “may” rule on EU law, even if the main case is not *itself* connected with EU law? The admissibility of a referral for preliminary ruling depends on how relevant the answer is for the case before the referring court. If a national measure affects the independence of the court having jurisdiction on the main case, it is likely to have an impact on the outcome of the case, hence making the answer of the Court relevant for the referring court, whether the main case itself falls within the ambit of EU law or not. However, if the concrete situation does not fall within the scope of EU law, the referring court must explain clearly in the order for reference

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<sup>47</sup> For a collection of Grimm’s main articles on the subject, translated into English, see Grimm, *The Constitution of European Democracy* (OUP, 2017).

<sup>48</sup> Hillion, “Overseeing the rule of law in the European Union. Legal mandate and means”, Swedish Institute for European Policy Studies, *European Policy Analysis*, 2016-1.

<sup>49</sup> Pech and Platon, “Systemic Threats to the Rule of Law in Poland: Between Action and Procrastination”, Fondation Robert Schuman, *European Issue* n°451, 2017.

<sup>50</sup> Opinion 2/13, EU:C:2014:2454, para 168 and 191.

<sup>51</sup> See below 5.4.2.

how the interpretation of the Court as to whether a national measure affects the independence of national courts is relevant for the main case,<sup>52</sup> and in particular how this interpretation may affect the outcome of the main case.

### **5.3 The content of the obligation for Member States to ensure that their courts meet the requirements of effective judicial protection**

For the Court, the salary-reduction measures do not infringe the EU principle of judicial independence because they led to a limited and temporary reduction of remuneration to help lower ‘the Portuguese State’s excessive budget deficit’ and applied to various categories of public sector employees. The disputed measures could not therefore ‘be perceived as being *specifically adopted* (our emphasis) in respect of the members’ of the Portuguese Court of Auditors. This suggests, *a contrario*, that national measures which (i) are permanent and/or excessive; (ii) specifically target the judiciary or specific courts (e.g. a Supreme Court<sup>53</sup>) or specific categories of judges within specific courts (e.g. Court Presidents<sup>54</sup>) and (iii) are not justified by objective reasons of public interest could be found ‘to impair the independence’ of relevant national courts and their members and as such be held incompatible with the second subparagraph of Article 19(1) TEU.

The question remains as to the exact content of the EU obligation for Member States to ensure that their courts meet the requirements of effective judicial protection. Is it limited to the independence of judges, like in the present case? After all, as the Court itself emphasised in the instant ruling, “the principle of the effective judicial protection of individuals’ rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States,” which has been enshrined in Articles 6 and 13 ECHR and which is now reaffirmed by Article 47 of the Charter.<sup>55</sup> This legal nexus of inter-normativity suggests that the concept of “effective judicial protection” under Article 19(1) encompasses various guarantees, and notably those enumerated by Articles 6-13 ECHR and Article 47 of the Charter. These are the right to a fair trial, the right to public hearings, the right to be judged within a reasonable time, the right to be judged by an impartial tribunal previously established by law, the right to be advised, defended and represented, the right to legal aid, etc. May one assume that all of these rights now benefit from

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<sup>52</sup> Case C-268/15, *Ullens de Schooten*, EU:C:2016:874, para 54.

<sup>53</sup> See in this respect the Polish law on the Supreme Court which is currently the subject of an infringement procedure on the ground that the forced retirement of a number of Supreme Court judges, including its the First President whose 6-year mandate is to be prematurely terminated, would undermine the principle of judicial independence with the consequence therefore that Poland is failing to fulfil its obligations under Article 19(1) TEU read in connection with Article 47 of the Charter. See European Commission, Rule of Law: Commission launches infringement procedure to protect the independence of the Polish Supreme Court, Press release IP/18/4341, 2 July 2018. In the absence of any satisfactory answer from the Polish government, the Commission has recently referred the matter to the Court of Justice: Rule of Law: European Commission refers Poland to the European Court of Justice to protect the independence of the Polish Supreme Court, Press release IP/18/5830, 24 September 2018. Particularly worth noting is the Commission’s request the Court of Justice to order interim measures, restoring Poland’s Supreme Court to its situation before 3 April 2018, when the contested new laws were adopted.

<sup>54</sup> See pending infringement case against Poland regarding its Law on the Ordinary Courts Organisation. When it first launched the infringement procedure, the Commission emphasised *inter alia* its concern with respect to the Polish Minister of Justice’s discretionary power to dismiss and appoint Court Presidents and argued that this discretionary power would undermine the independence of Polish courts in breach of Article 19(1) TEU in combination with Article 47 of the Charter. See European Commission launches infringement against Poland over measures affecting the judiciary, Press release IP/17/2205, Brussels, 29 July 2017. Astonishingly, the Commission has since seemingly decided not to challenge this aspect of the Poland’s judicial “reforms”: Taborowski, “The Commission takes a step back in the fight for the rule of law”, *VerfassungsBlog*, 3 January 2018: <https://verfassungsblog.de/the-commission-takes-a-step-back-in-the-fight-for-the-rule-of-law/>

<sup>55</sup> Para 35.

the protection of Article 19(1)? Only time will tell but we would argue that the Court should not make a difference between independence and the other guarantees of the right to a fair trial as this could increase the protection of the right to a fair trial under EU Law, especially considering the broad scope of Article 19(1) TEU compared to Article 47 of the Charter. However, by bypassing the scope of Article 47 as set in Article 51(1) Charter, such an expansion of the right to an effective remedy and to a fair trial would also arguably impact even more the distribution of powers between the EU and the Member States, which may prove controversial.

Yet, the added value of Article 19(1) for the other guarantees of the right to an effective remedy and to a fair trial will depend on the kind of cases in which Article 19(1) is relied upon. *In concreto*, the added value of Article 19(1) TEU compared to Article 47 of the Charter will depend on whether the scope of the former is confirmed as being broader than the scope of the latter. *In abstracto*, Article 19(1) may prove useful to challenge national measures which structurally undermine the right to a fair trial. However, not all guarantees included in the right to a fair trial are equally susceptible of being affected by national general measures, and therefore of giving rise to cases which may then lead in turn to national referrals for a preliminary ruling. Typically, the right to be judged within a reasonable time is usually quite circumstantial, unless a national measure clearly burdens the procedure in a way that makes it impossible to deliver a judgment within a reasonable time. Impartiality can be affected by the organisation of the national court system, in particular when the same judge takes part in several stages of the proceedings, but even then, it is also a matter of circumstances.<sup>56</sup> A national law can, by itself, create excessive limitations to the right to public hearings,<sup>57</sup> but the disproportion is more likely to result from a decision to hear a particular case behind closed doors. The same goes to the right to be advised, defended and represented and the right to legal aid. All in all, Art. 19(1) TEU would certainly be useful for guarantees other than independence, but probably to a lesser extent since these other guarantees are less likely to be affected by general measures.

## 5.4 The possible broader implications of *Associação Sindical dos Juízes Portugueses*

### 5.4.1 A quasi-federal move?

As Advocate General La Pergola put it in his opinion on *Kremzow*, “[t]he Community legal order is not all-embracing”.<sup>58</sup> There are numerous legal areas and situations which are not governed by EU Law and are therefore out of reach for the Court of Justice. There are two reasons why this is the case. Firstly, a lot of subject matters remain outside of the scope of EU law, either because the EU has not been given any power on these subject matters, in accordance with the principle of conferral,<sup>59</sup> or because the autonomy of the Member States has been explicitly reserved in a particular field, for example national security.<sup>60</sup> Secondly, Free Movement Law (*lato sensu*, i.e. single market law and citizenship law), which has the potential to affect national regulations regardless of their subject matter as long as they have an impact on free movement<sup>61</sup>, is inapplicable to “wholly internal situations”, i.e. situations defined by

<sup>56</sup> ECtHR, *Hauschildt v. Denmark*, Appl. No. 10486/83, judgment of 24 May 1989, para 48.

<sup>57</sup> See for example ECtHR, *Diennet v. France*, Appl. No. 18160/91, judgment of 26 September 1995, para 30-35.

<sup>58</sup> La Pergola, Opinion on Case C-299/95, *Friedrich Kremzow v. Republik Österreich*, EU:C:1997:58, para 7.

<sup>59</sup> Art. 4(1) and Art. 5(2) TEU.

<sup>60</sup> Art. 4(2) TEU.

<sup>61</sup> See for example the famous Dassonville formula: “all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade are to be considered as measures having an effect equivalent to quantitative restrictions”, Case 8-74, EU:C:1974:82, para 5. The Court later narrowed down this definition in *Keck and Mithouard* by excluding from this definition national provisions restricting or prohibiting certain selling arrangements: Joined Cases C-267/91 and C-268/91, EU:C:1993:905, para 16.

the lack of a cross-border link, namely, when all the elements of a given case are confined within the territory of a single Member State.<sup>62</sup>

Arguably, this is not a defect of EU law but an intrinsic part of the constitutional design of the EU which reflects *inter alia* the constitutional trade-offs and compromises between the tenants of supranationalism and the defenders of intergovernmentalism, “the two polar forces whose constant cycle of confrontation and accommodation” has driven “much of the EU’s institutional and constitutional development”.<sup>63</sup> In order to preserve their autonomy, especially in sensitive areas, Member States have sought to preserve an “EU-free legal space” where national choices can be made without any constraints from EU Law. Yet, the Court of Justice has gradually reduced the “EU-free space” within national legal systems. This evolution affects both the subject matters and the situations covered by EU law.

With respect to *subject matters*, not only have the legislative competences of the EU expanded with each European treaty, but they have also been interpreted by the Court in a teleological way. It is now commonplace in EU law that even when exercising their retained competences, Member States must comply with EU law. Spheres of national competence, once free of any EU “constraints”, are now subject to conditions and limitations resulting from EU law, such as national rules governing a person’s surname<sup>64</sup> or nationality.<sup>65</sup>

With respect to *situations* governed by EU Law,<sup>66</sup> the case-law of the Court shows not only that the notion of purely internal situation is construed restrictively<sup>67</sup> but also that the rule according to which EU law does not apply to “purely internal situations” has multiple exceptions both in single market law<sup>68</sup> and in citizenship law,<sup>69</sup> and that the existence of a purely internal situation does not always limit the jurisdiction of the Court of Justice.<sup>70</sup>

The present ruling can be said to extend the scope of EU law in the two dimensions distinguished above. The organisation of national justice as a subject-matter is usually considered to be a retained national competence, provided that the conditions for legal claims based on EU law laid down by national law are not less favourable than those relating to similar domestic claims (principle of equivalence) and are not framed as to make it virtually impossible or excessively difficult for an individual to obtain what he or she is entitled to according to EU law (principle of effectiveness).<sup>71</sup> In *Associação Sindical dos Juizes Portugueses*, the Court has gone a step further by establishing an EU standard of justice with a very broad scope of application. As for the situations governed by EU law, the “potential jurisdiction test” makes the obligation to ensure that national courts meet the requirements of effective judicial

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<sup>62</sup> Case 175/78, *The Queen v. Vera Ann Saunders*, EU:C:1979:88, para. 11.

<sup>63</sup> Dougan, ‘The Treaty of Lisbon 2007: Winning Minds Not Hearts’, 45 CML Rev. (2008), 617-703, at 692.

<sup>64</sup> Case C-148/02, *Garcia Avello*, EU:C:2003:539.

<sup>65</sup> Case C-135/08, *Janko Rottmann v Freistaat Bayern*, EU:C:2010:104.

<sup>66</sup> See recently Iglesias Sanchez, “Purely Internal Situations and the Limits of EU Law: A Consolidated Case Law or a Notion to be Abandoned?”, *EuConst* 14 (2018), 7-36.

<sup>67</sup> For a case where the Court found a cross-border situation even though there was no physical movement across a border: Case C-200/02, *Zhu and Chen*, EU:C:2004:639.

<sup>68</sup> Joined Cases C-321, 322, 323, 324/94, *Pistre*, para 44; Case C-71/02, *Herbert Karner Industrie-Auktionen GmbH*, EU:C:2004:181, para 20 (national rule having a potential effect on free movement of goods).

<sup>69</sup> Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l’emploi (ONEm)*, EU:C:2011:124; Case C-650/13, *Thierry Delvigne v. Commune de Lesparre Médoc and Préfet de la Gironde*, EU:C:2015:648.

<sup>70</sup> Joined Cases 297/88 and C-197/89, *Dzodzi*, EU:C:1990:360 (when national law extends EU rules to purely internal situations); Case C-448/98, *Guimont*, EU:C:2000:663, para 23 (when the national court needs to know what would be the right of an EU citizen in the same situation in order to prevent or redress reverse discrimination). See Case C-268/15, *Ullens de Schooten*, para 47-53, for a clarification and rationalisation of the case-law.

<sup>71</sup> See e.g. Case C-261/95, *Rosalba Palmisani v. Istituto nazionale della previdenza sociale (INPS)*, EU:C:1997:351, para 27 and Kakouris, “Do the Member States Possess Judicial Procedural “Autonomy”?”, 34 CML Rev. (1997), 1389; Wallerman, “Towards an EU Law Doctrine on the Exercise of Discretion in National Courts? The Member States’ Self-Imposed Limits on National Procedural Autonomy”, in 53 CML Rev. (2016), 339.

protection applicable even in situations where no specific EU rule is applicable. However positive that is for upholding the rule of law at a time of rising authoritarianism, it is also likely to raise constitutional issues related to the retained competences of Member States and the vertical distribution of powers within the EU.

In establishing a general obligation for Member States to guarantee and protect judicial independence on the basis of a bold yet compelling combined reading of Articles 2, 4(3) and 19(1) TEU, irrespective of whether the situation falls within the scope of EU law as understood before *Associação Sindical dos Juizes Portugueses*, the Court's ruling is reminiscent of the 1925 US judgment of *Gitlow v New York*,<sup>72</sup> in which the Supreme Court held that the Fourteenth Amendment to the US Constitution<sup>73</sup> had extended the reach of certain limitations on federal government authority set forth in the First Amendment to the governments of the individual states. In the instant case, one may argue that the Court has essentially made the EU principle of effective judicial protection (including the principle of judicial independence) a quasi-federal standard of review which may be relied upon before national courts in virtually any situation where national measures target national judges who may hear actions based on EU law. To put it differently, *Associação Sindical dos Juizes Portugueses* may be viewed as having established the first exception to the principle whereby the EU system for the protection of fundamental rights does *not* apply "irrespective of the subject-matter at issue, that is to say irrespective of whether it falls within federal or State competence".<sup>74</sup> This is why a parallel to *Gitlow* appears justified. To pursue the analogy further, Article 19(1) TEU could then be considered the EU equivalent of the 14<sup>th</sup> Amendment to the US Constitution, the difference being that *Gitlow* was directly about the protection of individual rights through the enforcement of federal rights against state authorities while *Associação Sindical dos Juizes Portugueses* is primarily about protecting national courts against national authorities through the enforcement of supranational structural guarantees (in particular judicial independence) with the view of indirectly protecting individuals' rights under EU law.

#### 5.4.2 A decisive warning to would-be autocrats?

By making Article 19(1) TEU a stand-alone provision, the Court of Justice has considerably increased the number of situations where national litigants (for instance, a trade union representing judges or a dismissed or demoted judge) may challenge national measures which undermine judicial independence. In so doing, the Court may have answered the appeal from a number of scholars to operationalise Article 2 TEU by connecting it to other provisions of the TEU such as Article 4(3) and Article 19(1). In 2016, building up on the scholarship of Professor Scheppele, Professor Kochenov and one of the authors of this note argued for the combined use of these Treaty provisions so as to enable the review of national breaches of the rule of law happening beyond the areas covered by the EU's legislative acquis:

[T]here is however no legal obstacle preventing the Commission from using the infringement procedure to simultaneously investigate a set of diffuse and/or cumulative breaches of EU values in conjunction with EU principles such as the duty of loyalty, which is enshrined in Article 4(3) TEU ... or the

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<sup>72</sup> 268 U.S. 652 (1925).

<sup>73</sup> Section 1. ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

<sup>74</sup> Lenaerts, "Respect for Fundamental Rights as a Constitutional Principle of the European Union", (2000) 6 Columbia Journal of European Law 1 at 21.



requirement that Member States ‘shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’ (Article 19(1) TFEU).<sup>75</sup>

By establishing, on the basis of a compelling combined reading of Articles 2, 4(3) and 19(1) TEU, that Member States must ensure that their national courts meet ‘the requirements essential to effective judicial protection’, the Court has taken a most welcome stance on the existential threat which Hungary and Poland’s descent into authoritarianism poses for the EU’s interdependent and interconnected legal system. In this respect, a number of statements may be understood as not-so subliminal warnings to would-be autocrats in these two countries but also elsewhere:

The guarantee of independence, which is inherent in the task of adjudication ... is required not only at EU level as regards the Judges of the Union and the Advocates-General of the Court of Justice ... but also at the level of the Member States as regards national courts. [...]

The concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, [...]

Like the protection against removal from office of the members of the body concerned ... the receipt by those members of a level of remuneration commensurate with the importance of the functions they carry out constitutes a guarantee essential to judicial independence.<sup>76</sup>

What should Polish,<sup>77</sup> Hungarian,<sup>78</sup> Bulgarian<sup>79</sup> or Romanian<sup>80</sup> judges (to mention the most obvious examples of countries where ruling parties are currently seeking to systemically subjugate the judiciary) be prepared to do in practice when faced with national measures which de facto undermine their authority and independence? As would-be autocrats tend to methodically follow a Rule-of-Law dismantlement blueprint,<sup>81</sup> a Rule-of-Law resistance blueprint may be in order, such as the tentative one below:

(a) National litigants/judges should aim (via trade unions preferably to avoid formal and informal retaliatory measures<sup>82</sup>) to systematically challenge on the basis of Article 19(1) TEU as interpreted in Case C-64/16 the compatibility of any national measure which affects judicial independence via for instance new general rules amending their status, terms of office, disciplinary regime or individual negative decisions terminating for instance their role as president of a court or forcing their early retirement on the basis of retroactive legislation;

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<sup>75</sup> Kochenov and Pech, “Better late than never? On the European Commission’s Rule of Law Framework and its First activation”, (2016) 54 JCMS 1062, at 1065.

<sup>76</sup> Paras 42, 43-45.

<sup>77</sup> For a recent account, see Report of the UN Special Rapporteur on the independence of judges and lawyers on his mission to Poland, UN General Assembly, A/HRC/38/38/Add.1, 25 June 2018: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23258&LangID=E>

<sup>78</sup> See recently Hungarian Helsinki Committee, *Attacking the last line of defence. Judicial Independence in Hungary in Jeopardy*, 15 June 2018: <https://www.helsinki.hu/en/attacking-the-last-line-of-defence/>

<sup>79</sup> See recently Vassileva, “The Disheartening Speech by the President of Bulgaria’s Supreme Court Which Nobody in Brussels Noticed”, *VerfassungsBlog*, 11 July 2018: <https://verfassungsblog.de/the-disheartening-speech-by-the-president-of-bulgarias-supreme-court-which-nobody-in-brussels-noticed/>

<sup>80</sup> See recently Venice Commission, *Romania: Preliminary Opinion on draft amendments to Law no 303/004 on the statute of judges and prosecutors, Law no 304/2004 on judicial organization and Law no 317/2004 on the superior council for magistracy*, Opinion No 924/2018, 13 July 2018.

<sup>81</sup> Pech and Scheppele, “Illiberalism Within”, op. cit.

<sup>82</sup> For a shocking recent account, see Davies, “‘They’re trying to break me’: Polish judges face state-led intimidation”, *The Guardian*, 19 June 2018.

(b) To systematically request from (not yet captured) national courts that they refer questions to the Court of Justice to enable it to rule on whether the national measures at issue in each case can be considered to impair the independence of the members of the relevant national court(s);

(c) ‘Friends of the rule of law’ should systematically lodge infringement complaints with the European Commission to ask it to investigate infringements of Article 19(1) TEU and request it to refer these situations to the Court of Justice as soon as possible;

(d) Considering the default tendency of the Commission to believe despite all contrary available evidence in the virtue of dialoguing with authorities engaged in a systemic process of annihilating judicial independence and wait until it is arguably too late to initiate infringement actions,<sup>83</sup> other national governments should revive Article 259 TFEU<sup>84</sup> and ask the Court of Justice to adopt interim measures so as to prevent as far as possible judicial purges and the creation of new facts on the ground while actions are pending before the Court;

(e) Similarly, national courts should follow the lead of the Irish High Court<sup>85</sup> and ask the Court of Justice, when and wherever possible, to review every single mechanism or judicial tests predicated on mutual trust/mutual recognition so to give the Court of Justice the opportunity to decide whether they need to be honoured or revisited in a situation where the relevant national authorities may be said to be engaged in a systemic undermining of “the edifices of a democracy governed by the rule of law”;<sup>86</sup>

(f) Lastly, with respect to countries where the national judiciary may already be captured in whole or in part by the ruling party, which may result in requests for preliminary rulings being systematically denied even at the level of courts of last resort and/or national judgments offering interpretations of EU law in bad faith, the Commission should systematically initiate infringement actions.<sup>87</sup>

For those who take Article 2 TEU seriously, *Associação Sindical dos Juizes Portugueses* offers a silver lining. The Court’s operationalisation of Article 19(1) TEU, while compelling and welcome, is not however bullet-proof. By making *inter alia* the specific targeting of judges part of its test<sup>88</sup> to decide when one may directly raise a violation of the EU principle of judicial independence via Article 19(1) TEU, the Court leaves however open one possible option for autocratic governments to annihilate judicial independence without activating Article 19(1): the option to act against all checks and balances simultaneously, for instance, by cutting their

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<sup>83</sup> See e.g. the decision to launch an infringement procedure to protect the independence of the Polish Supreme Court just the day before the entry into force of a constitutionally suspicious (to say the least) and internationally decried law which is forcing more than one in every three judges of the Supreme Court to retire: See Rule of Law: Commission launches infringement procedure to protect the independence of the Polish Supreme Court, Press release IP/18/4341, 2 July 2018. This may be misconstrued as a Commission unwilling or unable to learn from its past failures to act promptly. See e.g. Tomasz Konieczny who speaks of the Commission’s persistent institutional impotence and naivety, “The Białowieża case. A Tragedy in Six Acts”, *VerfassungsBlog*, 17 May 2018: <https://verfassungsblog.de/the-bialowieza-case-a-tragedy-in-six-acts>.

<sup>84</sup> Kochenov, ‘Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make it a Viable Rule of Law Enforcement Tool’ (2016) 15(7) *HJROL* 153.

<sup>85</sup> Judgment of Ms. Justice Donnelly delivered on the 12th day of March, 2018, *The Minister for Justice and Equality and Artur Celmer*.

<sup>86</sup> *Ibid*, para 142.

<sup>87</sup> Case C-154/08 is noteworthy in this respect as this is the first ruling in which the Court of Justice held a Member State in breach of EU law as a result of a national Supreme Court decision not to refer. See annotation by López Escudero (2011) 48 *CML Rev.* 227.

<sup>88</sup> Paras 48-49 of the ruling.

budgets all at once so that the judiciary is not singled out.<sup>89</sup> The explicit and powerful recognition of the national judiciary as the institution that guarantees the enforcement EU law in all but a few atypical cases, and so that its general health and independence must be a matter of EU concern and not impossible to challenge directly on the basis of EU law, is however to be praised.

## 6. Conclusion

EU institutions and actors must wake up to the existential dangers raised by increasing and spreading rule of law backsliding within the EU. Following this timely and welcome development in Luxembourg, it is to be hoped that the Commission will not only seek to rely more forcefully on Article 19(1) TEU in its infringement actions but also think more strategically about rule of law backsliding. It was disappointing in this respect to see the Commission arguing that the preliminary ruling request in the present case was inadmissible<sup>90</sup> or (seemingly) failing to consider asking the Court to impose a penalty payment in the Białowieża Forest infringement case when confronted to a government so defiantly refusing to comply with a previous order of the Court.<sup>91</sup> This suggests a worrying inability to learn from past mistakes and failed attempts to prevent Hungary's descent into authoritarianism and think strategically beyond the case at hand.

The launch of an infringement procedure regarding the Polish law on the Supreme Court on 2 July 2018 is not reassuring in this respect as this step should have arguably been taken last spring on the back of the ruling examined in this casenote. It was by then obvious that the Polish government was not going to offer any meaningful "concession" and was instead planning to present the EU with another *fait accompli* this time with respect of the Polish Supreme Court, which is being purged in plain sight as we write these lines. Similarly, the arguments put forward by the Commission in *Minister for Justice v LM* may be construed as another instance where the Commission is, from our point of view, refusing to face reality or at the very least draw the logical conclusions from its own assessment of the rule of law situation in Poland when it argues that "the fact that a Member State has been the subject of a reasoned proposal as referred to in Article 7(1) TEU does not mean that the surrender of an individual to that Member State automatically exposes him to a real risk of breach of the right to a fair trial".<sup>92</sup> The Court of Justice, in this case, considered that the surrender of an individual could only be suspended if, on the top of systemic rule of law deficiencies in the Member State that had issued the European arrest warrant, the individual would personally "run a real risk of breach of his fundamental right to an independent tribunal ... having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant".<sup>93</sup> One may however remain unconvinced by the claim, which we find absurd, that a defendant could still get a fair trial in a country where the

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<sup>89</sup> We are grateful to Professor Scheppele for pointing this out to us.

<sup>90</sup> The European Commission contented that the Portuguese referring court had not offered sufficient information to enable the Court of Justice to understand why an interpretation of Article 19(1) TEU and Article 47 EUCFR was sought.

<sup>91</sup> See AFP, "Poland accuses EU's top court of bias in primeval forest case", 13 September 2017 (the article refers to a statement from Poland's environment ministry in which the ministry criticises the Court of Justice's vice-president for taking the "role of the plaintiff by making suggestions to European Commission representatives about the content of their motion").

<sup>92</sup> Opinion of Advocate General Tanchev, Case C-261/188 PPU, 28 June 2018, para 103. For a critique of the Commission's approach, which the AG decided to support, see Bárd and van Ballegooij, "The AG Opinion in the Celmer Case: Why Lack of Judicial Independence Should Have Been Framed as a Rule of Law Issue", *VerfassungsBlog*, 7 July 2018: <https://verfassungsblog.de/the-ag-opinion-in-the-celmer-case-why-lack-of-judicial-independence-should-have-been-framed-as-a-rule-of-law-issue>

<sup>93</sup> Case C-216/18 PPU, *LM*, EU:C:2018:586, para 75.

independence of the judiciary is being systematically undermined, national judges openly bullied by the government and subject to disciplinary or criminal investigations when they submit references for a preliminary request, and the effective constitutional review of Polish legislation no longer guaranteed according to the Commission's own (Article 7 TEU) assessment.<sup>94</sup> Schizophrenia comes to mind.

In a recent speech, President Lenaerts exhorted us to “stand up for the rule of law” and to “refuse to take a single backward step whenever and wherever it is called into question and whatever the short-term difficulty or cost of that stance”.<sup>95</sup> We could not agree more. We are now facing a situation where “pluralist democratic norms are being subverted, and a slide toward authoritarianism is giving way to incipient authoritarianism” in a number of EU countries, with the assault “focused on the rule of law and its guarantor, an independent judiciary”.<sup>96</sup> The time for discussion is over. The time for action (and sanction) is now.

Addendum: Posterior to the writing of this casenote, two major developments took place: On 12 September 2018, the European Parliament voted in favour of the activation of Article 7(1) TEU against Hungary.<sup>97</sup> On 24 September 2018, the European Commission decided to refer Poland to the Court of Justice due to the violations of the principles of judicial independence created by the new Polish Law on the Supreme Court. In a welcome and to the best of our knowledge, unprecedented move, the Commission is not merely claiming a violation of Article 19(1) TEU but has also asked the Court of Justice not only to expedite the proceedings but also to “order interim measures, restoring Poland's Supreme Court to its situation before 3 April 2018, when the contested new laws were adopted”.<sup>98</sup> These two developments are to be welcome as “the consolidation of majoritarian autocracies (sometimes wrongly called ‘illiberal democracies’) represents more of an existential threat to the EU's existence and functioning than the exit of any of its Member States”.<sup>99</sup>

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<sup>94</sup> For a recent overview and examples of state-sponsored harassment of Polish judges, see Pech and Wachowiec, “Rule of Law in Poland (or lack thereof): 7 Questions for the Article 7 Hearing”, *Euronews*, 17 September 2018: <https://www.euronews.com/2018/09/17/rule-of-law-in-poland-or-lack-thereof-7-questions-for-the-article-7-hearing-view>

<sup>95</sup> “The Court of Justice and the Rule of Law”, Speech at the XXVIIIth FIDE Congress, Estoril, May 2018 (on file with the authors).

<sup>96</sup> Editorial Board, “Democracy's slow fade in Central Europe”, *The Washington Post*, 7 July 2018.

<sup>97</sup> European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)). For background and a critical analysis, see Carrera and Bárd The European Parliament Vote on Article 7 TEU against the Hungarian government, *CEPS Commentary*, 14 September 2018.

<sup>98</sup> European Commission, press release IP/18/5830.

<sup>99</sup> Pech and Scheppele, “Poland and the European Commission, Part I: A Dialogue of the Deaf?”, *Verfassungsblog*, 3 January 2017.